83-1967

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,
1983

NO._____

* * * * * *

JOHN MURRAY
PETITIONER

vs.

BRANCH MOTOR EXPRESS COMPANY
and LOCAL 557, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

* * * * * *

On Writ of Certiorari to the
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

* * * * * * *

PETITION FOR A WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED FOR REVIEW

I - SHOULD THIS COURT'S DECISION IN DEL-COSTELLO vs. TEAMSTERS, 103 S. Ct. 2281 (1983) BE GIVEN PROSPECTIVE OR RETRO-ACTIVE EFFECT?

II- SHOULD THE ISSUE OF RETROACTIVITY OF NEWLY ANNOUNCED DECISIONS IN CIVIL LAW BE BASED ON LAW THAT EXISTS AT THE TIME THE CAUSE OF ACTION ACCRUES OR AT THE TIME OF THE NEWLY ANNOUNCED DECISION?

III-MUST ALL THREE FACTORS IN CHEVRON OIL vs. HUSON, 404 U. S. 97 (1971) BE MET IN ORDER TO LEND PROSPECTIVE EFFECT TO NEWLY ANNOUNCED DECISIONS IN CIVIL LAW OR IS ONE CHEVRON FACTOR MORE DETERMINATIVE THAN THE OTHER FACTORS?

TATEMENT OF PARTIES TO THESE PROCEEDINGS

The Petitioner, John Murray, was the laintiff in the United States District Court or the District of Maryland. Petitioner urray was the Appellant before the United tates Court of Appeals for the Fourth ircuit. Local 557 and Branch Motor Express ere the defendants in the United States istrict Court for the District of Maryland. oth Local 557 and Branch Motor Express were he Appellees before the United States Court f Appeals for the Fourth Circuit.

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LOWER COURT OPINIONS

The District Court Opinion is unpublished. The Opinion of the United States Court of Appeals for the Fourth Circuit appears at 723 F2d 1146.

JURISDICTION OF THIS COURT

The Jurisdiction of This Court is sought, ursuant to 28 U. S. C. 1292 (a).

STATEMENT OF THE CASE

This case is an action for breach of Union-Employer Contract and for unfair representation filed on September 13, 1978, under Section 301 of L.M.R.A. Plaintiff Murray alleged that defendant Branch breached the National Master Freight Agreement in October 1975 and April 1976, resulting in discharge from his job. The complaint alleged that Defendant Local No. 557 breached its duty of fair representation by failing to grieve an improper warning letter in October, 1975 and improperly representing him at an arbitration hearing in April, 1976. During the period from April, 1976 until September, 1978, the applicable limitations periods for fair representation suits were lengthy in all Circuits, in excess of three years based on this Court's Decision in Auto Workers vs. Hoosier Cardinal, 383 U. S. 696 (1966). Judgment was first originally entered in the District Court on July 24, 1979

Murray's failure to exhaust his internal union remedies. The defense of limitations was never raised or argued by the defendants. On May 6, 1980, the Circuit Court affirmed.

On June 8, 1981, This Court, the Supreme Court of The United States, reversed the Judgment of the Fourth Circuit, and remanded this case for further proceedings in light of This Court's Decision in Clayton vs. I.T.T. Gilfillan, 451 U. S. 679 (1981).[a/] The District Court, on remand granted Summary Judgment. Ignoring This Court and flagrantly flouting This Court's Mandate, the District Court repeated its original conclusion that the suit was barred by failure to exhaust internal remedies, as if This Court and Its Decision had never existed.

The Fourth Circuit affirmed that Judgment based solely on This Court's Decision in DelCostello vs. Teamsters, 103 S. Ct. 2281 (1983).

a/ 452 U.S. 911 (1981)

It ignored plaintiff's argument that DelCostello should be applied prospectively, only, and that but for the prior erroneous rulings of the lower Federal Courts and the ensuing delay. The case could have been tried before DelCostello, supra or Mitchell, 2/ which drastically shortened the statute of limitations in fair representation suits.

It is this Decision which Petitioner now seeks to bring before This Honorable Court for its review. The time for filing the Petition for Certiorari was extended until May 18, 1984. (Appendix)

2/ 451 U.S. 56 (1981).

ARGUMENT

The Petition for Certiorari should be granted for the following reasons. There is a substantial conflict[1/] between the Circuits concerning whether This Court's Decision in Del-Costello vs. Teamsters, 103 S. Ct. 2281 (1983) should be applied retroactively to pending cases. Just this term, this Court granted a Petition for Certiorari in Solem vs. Stumes, 52 U. S. Law Week 4307 (1984) when The Courts below were divided on whether to give retroactive application to Edwards vs. Arizona, 451 U. S. 477 (1981.)

1/ Pitts vs. Frito-Lay, 700 F2d 330 (Sixth Cir., 1983), 112 L.R.R.M.; See Also, LaBond vs. McLean Trucking Co. (No. 82-1576), (Sixth Cir., 1983); Nelson vs. Local 36, 719 F2d 1036 (Ninth Cir., 1983); applying Del Costello prospectively contra, Perez vs. Dana Corp., 718 F2d 581 (Third Cir., 1983); Edwards vs. Sea Land Services, 720 F2d 857 (5th Cir., 1983); Rogers vs. Lockheed, 720 F2d 247, (11th Cir., 1983).

The criteria for determining whether Del-Costello should be applied prospectively or retroactively is governed by This Court's Decision in Chevron Oil vs. Huson, 404 U. S. 97 (1971). However, there is a substantial conflict between the Circuits concerning the application of three Chevron factors which have affected the outcome of this case. Specifically, The Courts 2/ are divided on the application of the first Chevron factor concerning what case law should be applied for determining whether the new decision is clearly foreshadowed or has overruled clear past precedent. The Third Circuit applies case law at the time of the new ruling that changed prior law while the District of Columbia Circuit applies that case law which existed at the time the cause of action arose. In addition, This Court has never analyzed the

2/ See Marino vs. Bowers, 657 F2d 1363, 1365, 1367 (3rd Circuit, 1982; Wachovia Bank and Trust Co. vs. National Student Marketing Corp., 650 F2d 342, 347-348 (D. C. Circuit, 1980) Cert. den., 452 U. S. 954.

first Chevron factor or the reliance factor with regard to whether it should be analyzed in light of particular litigants in a given case or in light of general patterns through society. (See Simpson vs. Director, Office of Workers Compensation Programs, 681 F2d 81, 84 (First Circuit, 1982).

The lower Courts are also divided on the question of whether all three Chevron factors must be satisfied or whether one factor outweighs the other two. See Cash vs. Califano, 621 F2d 626, 631 (Fourth Cir., 1981) and Williams vs. Phil Rich Fan Manufacturing Co., 552 F2d 596, 600 (Fifth Cir., 1977).

The failure by This Court to immediately resolve these conflicts between the circuits will result in a considerable amount of unnecessary appellate litigation. In addition, there will be chaos and confusion concerning the application of Chevron Oil, supra to all areas of civil law whenever this Court announces a new Decision. Finally, the result of

retroactive or prospective application will be ased on the fortuities of where litigants reside rather than on any uniform application of the Chevron Oil factors.

The Fourth Circuit erred in this case by applying DelCostello retroactively. The three-factor test in Chevron Oil, supra compels prospective application. First, the DelCostello Decision was a case of first impression whose resolution was not foreshadowed in any way let alone "clearly foreshadowed." Initially, this Court in Auto Workers vs. Hoosier Cardinal, 383 U. S. 696 (1966) held that state contract statutes which were neither too short nor too long were appropriate for actions brought under Section 301 of the Labor Management Relations Act and rejected the six-month limitations period contained in Section 10 (b) of the National Labor Relations Act. This Court repeatedly held that State not Federal statutes would be borrowed when Congress had not enacted a limitations period. Johnson

vs. Railway Express Company, 421 U. S. 955 (1975). (State Law, not the exclusive guide, but primary guide.) Chevron Oil vs. Huson, 404 U. S. 97 (1971). In fact, This Court, prior to DelCostello had only borrowed a Federal limitations period only once in the last thirty (30) years when Congress had failed to enact a limitations period. See McAllister vs. Magnolia Petroleum Company, 357 U. S. 221 (1957). In reliance on these principles and decisions, particularly Hoosier Cardinal, the Circuit Court of Appeals uniformly borrowed state tort or contract statutes of limitations when the Section 301-Duty of Fair Representation suits were filed until 1980.[3/] The six-month limitations per-

3/ See DeArroyo vs. Sindicato de Trabajadores 425 F2d 281 (First Circuit, 1970) Abrams vs. Carter Cord, 434 F2d (2nd Cir., 1970); Kennedy vs .Wheeling Pittsburgh Steel Corp., 81 L.R.R.M. 2349 (Fourth Cir., 1972); Howard vs. Aluminum Workers, 589 F2d 771 (Fourth Cir., 1978); Smart vs. Ellis Trucking Co., 580 F2d 215 (Sixth Cir., 1978); Butler vs. Yellow Freight Lines, Inc., 514 F2d 442 (8th Cir., 1974).

iod was never borrowed in a single case until 1982 after this Court's Decision in U.P.S. vs. Mitchell, 451 U. S. 56 (1981). Even before Mitchell, no Circuit Court and nearly no District Court prior to 1980 applied a short state statute of limitations. The six-month limitations was rejected on three occasions prior to 1982. See DeArroyo, 425 F2d 281, 287; Buchholz Corp. vs. Swift, 52 F. R. D. 581 (D. Minnesota, 1973) and Tuma vs. American Can Co., 367 F. Supp. 1183 (D. , N. J., 1973).

Therefore, the DelCostello Decision and the application of short statutes of limitations in general of any kind was a development that was not foreshadowed in 1976 and clearly could not be anticipated.

The second factor in Chevron requires an examination of whether retroactive application would further or retard the operation of national labor policy.

Here, the statutory policies favoring a six-month limitation period will not be

furthered and the underlying duty of fair representation will be substantially disserved by retroactive application of DelCostello.

One of the primary reasons given by The Court for adoption of the six- month limitation period is that it would encourage the rapid disposition of labor disputes and in particular would expedite the finality of Grievance Decisions. See, also, U. P. S. vs. Mitchell, 451 U. S. 56 (1981). Yet, the only employees who will benefit from prospective application are those who filed suit before April 21, 1981 when Mitchell was announced which opened the way for the subsequent DelCostello Decision. Accordingly, retroactive application of DelCostello cannot encourage employees like Murray to file their actions more quickly since Murray already filed suit in 1978.

Moreover, retroactivity would be a serious disservice to the national labor policy upon which DelCostello was founded.

This Court has repeatedly recognized the strong interest which employees have in protection against unfair treatment by their exclusive representatives, e. g. Hines vs. Anchor Motor Freight, 424 U. S. 554 (1976). Indeed, the duty of fair representation and concomitant right to sue employers when the duty has been violated were developed in order to avoid serious constitutional questions which would otherwise be raised by exclusive representation. Vaca vs. Sipes, 386 U. S. 171 (1967). DelCostello was not intended to foreclose the remedy, but only to require that it be invoked promptly, if at all.

Yet, if DelCostello is applied retroactively, the effect will be to totally destroy any opportunity for resolution of Section 301 claims on the part of employees who had no opportunity to be guided by that Decision. In these circumstances, the constitutional questions presented by the Vaca line of cases will be presented. This conseq-

uence would surely retard national Labor policy.

The final factor in Chevron is consideration of the equity in a particular case. This factor is the strongest in favor of Petitioner Murray. Your Petitioner finds himself in front of This Court for a second time, solely because the District and Circuit Courts had previously erroneously ruled in favor of the defendants on the issue of exhaustion of internal union remedies. If these Courts Circuit had not so erroneously ruled, then this case would have been tried and completed at a time when the limitations period in the Fourth Circuit was certainly three years. (Howard vs. Aluminum Workers and Kennedy vs. Wheeling Pittsburgh Steel Corp., supra.)

Furthermore, This Court's Decisions have consistently distinguished between Decisions which extinguish a cause of action and those which simply increase or decrease the available remedies finding the former warrant prospective treatment. Chevron Oil, for example, not only emphasized the importance of preserving a

plaintiff's day in Court but confined its holding to the effects of Rodrigues on the statute of limitations, 404 U. S. 108-109 at No. 10.

Retroactive application would be particularly unjust in this case to hold Murray slept on his rights at a time when he could not have known the time limitation that the law would later impose upon him. Further, it is inequitable to permit Branch and Local 557, the benefit of a Decision which these defendants never seriously considered, much less invoked, from the date this action was filed until some thirty-six (36) months later, after the Supreme Court accepted certiorari and reversed in Mitchell.

Finally, it should be noted this case was on Appeal when Del Costello was decided. In Gulf Offshore Co. vs. Mobil Oil Corp., 453 U. S. 471, 486, Footnote 16, (1981), This Court observed "an appellate court must apply the law in effect at the time it rend-

ers its Decision." However, this Court also noted that an exception to this rule would be made to prevent "manifest injustice". This Court in Footnote 16 held this equitable exception would not be applied in a civil case where the change does not extinguish a cause of action. Here, the change does extinguish a cause of action and manifest injustice would result for the same reason as applying Del-Costello retroactively would be inequitable.

CONCLUSION

For all of the above reasons, the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. A-753, October Term, 1983

JOHN MURRAY
Petitioner,
vs.

BRANCH MOTOR EXPRESS COMPANY AND LOCAL NO. 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for Petitioner, it is ORDERED, that the time for filing the Petition for Writ of Certiorari in the above-entitled cause be, and the same hereby is extended to and including May 18, 1984.

Chief Justice of the United States

Dated this 19th day of March, 1984.

HM 78-1714

Date	NR	Vol. 1 Proceedings
1978		(1) Complaint, Request for Jury Trial
Sept. 13		and Exhibits 1 and 2.
"		(2) Summons issued (ccs. to attorney for plaintiff for service.)
Oct. 4		(3) ANSWER OF DEFENDANT, Local 557.
Oct. 5	4	ANSWER OF DEFENDANT, BRANCH MOTOR EXPRESS COMPANY
Oct. 30	5	Notice of Defendant, Branch Motor Express Company, of taking the Deposition of Plaintiff on November 9, 1978.
1979		
Feb. 12	6	Request of Defendant, Branch Motor Express Company, for Production of Documents, propounded to plaintiff.
Feb. 28	--	Scheduling Conference held before Murray, J.
April 9	7	Interrogatories (FIRST-SET) OF Defendant Branch Motor Company, propounded to plaintiff. (4/11/79 - Rec'd corrected Certificate of Service)
June 28	8	Answers of plaintiff to Interrogatories propounded by defendant, Branch Motor Express.
July 9	9	Motion of Defendant, Local 557, for Summary Judgment, Statement of Facts as to which there are no material issue, Memorandum in support thereof and attachments. (2 c/s)
July 11	--	Pre-Trial Conference held before Murray, J.

July 11	10	Request of Plaintiff for Production of Documents propounded to Defendants.
July 11	11	Notice of Plaintiff to take Deposition of Defendant, Branch Motor Express, on July 17, 1979.
July 12	12	Motion of Defendant, Branch Motor Express Company to Compel Answers to Interrogatories, Memorandum in support thereof, attachments and proposed Order. (2c/s)
July 12	13	Joinder of Defendant, Branch Motor Express Company, in Motion of Defendants, Freight Driver and Helpers Local 557 for Summary Judgment, Memorandum in support of Joinder of said Defendant and Exhibits A, B. and C (2c/s)
July 20	14	Deposition of Plaintiff taken on November 9, 1978 on behalf of Defendant, Branch Motor Express Co. and Exhibits 1, 2, 3 & 4. (filed separately) (Vol. III)
" "	15	Motion of Defendant, Branch Motor Express Co. for Protective Order, Exhibit A through E and Memorandum in Support thereof. (2 c/s)
" "	16	Supplemental Motion of Defendant, Branch Motor Express Co., to Compel Discovery, Exhibits A, B, and C and Memorandum in support thereof. (2 c/s)
" "	17	Memorandum of Defendant, Branch Motor Express Co., in support of said defendants Motion for part-

ial Summary Judgment and Attachment. (2 c/s)

1979			
July	20	18	Second Motion of Defendant, Freight Drivers and Helpers Local 557 for Summary Judgment, Statement of Facts, Memorandum in support thereof and Attachments (2 c/s)
"	"	19	Joinder of Defendant, Freight Drivers and Helpers, Local 557 in Motion of Defendant Branch Motor Express Company for a Protective Order and Attachment. (2 c/s)
July	20	20	Answer of Plaintiff to Motions of Defendants for summary judgment and Exhibits 1 through 7. (2 c/s).
"		21	Answer of Plaintiff to Motion of Defendant, Branch Motor Express Co., to Compel. (2 c/s).
July	24	22	Answer of Plaintiff to SECOND Motion of Defendant, Local 557, for summary judgment, Affidavit and EX. 1 (2 c/s).
"	"	----	Hearing on Motions of Defendants for Summary Judgment - held sub-curia.
"	31	23	Memorandum Opinion (Murray, J.) (C/M 8/1/79)-sms
"	"	24	Order (Murray, J.) GRANTING Motions of Defendants for Summary Judgment. (C/M 8/1/79)-sms

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN MURRAY :

v. : CIVIL ACTION NO.

BRANCH MOTOR EXPRESS COMPANY AND LOCAL NO. 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS : HM78-1714

: :

M E M O R A N D U M (Fd.1-25-82)

This action arises under §301 of the Labor Management Relations Act, 29 U.S.C. §185. The plaintiff, John Murray, brought this action for damages and reinstatement against his former employer and his local union. The basis of the suit is Mr. Murray's discharge for refusing to make a truck trip to Syracuse as ordered by his employer. The discharge was based both upon this occurrence and the fact that Murray had previously been given a warning letter in connection with a similar incident. Under the applicable labor contract

the National Master Freight Agreement as supplemented by the Maryland and District of Columbia over-the-road supplemental agreement for the period July 1, 1973 to March 31, 1976, an employee could only be dismissed if within the previous nine months he had received a warning letter for an offense of the type for which he is discharged. Murray asserts that the union breached its duty of fair representation by failing to have the warning letter removed from his file, as he asserts they promised to do, and by representing him in a perfunctory manner at the arbitration hearing at which his discharge was upheld. He further claims that the employer discharged him in violation of the contract. The defendants have now moved for summary judgment.

The plaintiff was hired by Branch in June, 1968. In 1974 he became an over-the-road driver. In 1974, Murray was terminated

by Branch for insubordination, but the union submitted the matter to arbitration and obtained Murray's reinstatement with full back pay. The plaintiff was terminated on at least two other occasions but the union was able to obtain his reinstatement without resort to arbitration. The second of these incidents took place in September of 1975, at which time Murray was terminated for refusing to follow the instructions of his supervisor. Negoations between the employer and the union ensued, and these discussions resulted in Murray's reinstatement with a loss of one week's back pay. This loss of pay constituted a suspension. Murray contends that he agreed to accept the settlement and the accompanying suspension on the understanding that a warning letter issued September 16, 1975 would be removed from his file and that he would not receive an additional warning letter. In fact, he did

receive an additional warning letter when he returned to work. He asserts that after he returned he pressured local union officials to have both warning letters removed from his file, apparently because he was aware that they could later serve as the basis for a dismissal. Murray claims that he was assured by Mr. Clyde Pusey, the union official who secured his reinstatement, that the warning letters would not count against him. Mr. Murray sent a letter to the employer protesting the warning letter and suspension on October 19, 1975.

On January 19, 1976, a dispatcher for the company called the plaintiff to have him report for work to handle a trip to Syracuse. The plaintiff replied that, under ICC regulations governing the amount of time drivers may spend on the road, he did not have enough time left to make the trip. The dispatcher noted that Murray had eight hours

left and that this was sufficient time for him to make the trip. The plaintiff continued to refuse to report for work and as a result he was terminated for insubordination.

The union protested the dismissal but the company was unwilling to rehire Murray on this occasion. The matter was therefore submitted to arbitration pursuant to the contract. At the arbitration hearing the union local was represented by its attorney, Mr. Rubenstein, and Murray also had with him an attorney he had personally hired. The presentation on behalf of the plaintiff was handled by Mr. Rubenstein, but Mr. Opara, plaintiff's personal attorney, also participated and was permitted to cross-examine witnesses. The union first raised two procedural issues. First, it argued that any matters concerning the plaintiff's past disciplinary record that were more than nine months old could not be discussed at the arbitration. Second, it

contended that it could contest the propriety of the warning letter issued several months earlier. The arbitrator ruled against the union on both of these matters, noting as to the second issue that the question of the warning letter could not be reopened because the union and the employer had agreed to a one week suspension and no grievance had been filed by the union.

On the merits of the discharge, the company showed that the normal running time to Syracuse is between 7 1/2 and 8 hours. The dispatcher, on cross-examination, denied that Murray had complained of being ill or fatigued at the time he was instructed to make the trip. The plaintiff's testimony consisted mainly of references to his illness during the period in question. He produced a doctor's slip dated April 6, 1976, which stated that he was suffering from influenza between January 19 and February 12. The

arbitrator noted that at a meeting between company and union representatives on January 29, the purpose of which was to discuss the termination, the plaintiff was present and did not produce a doctor's slip. The arbitrator also noted that the company would be gambling with a legal violation if it ordered a fatigued driver to make a trip. He found that the true reason for the refusal was Murray's belief that he did not have enough time. On this question, the arbitrator noted that the substitute driver made the trip in under eight hours and that company records indicated that this was the usual length of the trip. The arbitrator therefore found the termination to be justified. In moving for summary judgment on all claims, the defendants have presented the court with two alternative theories of the case. First, they contend that Murray failed to exhaust internal union remedies on the question of the union's

failure to protest the 1975 warning letter, and they further argue that the claims of inadequate representation in connection with the 1976 arbitration hearing amount at best to charges of negligence and thus may not be used as the basis for a claim for breach of the duty of fair representation. The court has little difficulty agreeing with the argument that Murray's complaints about the union's conduct of the arbitration hearing do not give rise to a breach of the union's duties to its members. This statutory duty includes the "obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca vs. Sipes, 386 U. S. 171, 177 (1967). Although the question of the union's intent is thus of some importance, summary judgment has been held to be appropriate if it be-

comes apparent that the plaintiff's claim relates only to the choice of tactics by the union. Walden vs. Local 71, International Brotherhood of Teamsters, 468 F2f 196 (4th Cir. 1972). In this case, the affidavit of Bernard Rubenstein, the attorney who represented the union at the arbitration hearing, indicates that the union acted fairly and reasonably in representing Mr. Murray. The plaintiff has made no effort to rebut the facts presented in this affidavit, and the court is thus entitled to treat them as facts about which there is no dispute. The affidavit recites that Mr. Rubenstein is an attorney with considerable experience in the conduct of arbitration hearings and in the practice of labor law generally, that he presented legal arguments to the arbitrator on the propriety of considering Murray's prior disciplinary record and the warning letters, that he cross-examined witnesses and offered the plaintiff as a witness on his own

behalf, and that he presented to the arbitrator all the evidence of the plaintiff's medical condition that had been given to him.

When these facts are considered in conjunction with the claims made by the plaintiff, it is apparent that these claims at most relate to the choice of tactics made by the union and do not give rise to a breach of the duty of fair representation. Murray complains of the union's failure to prevail on the issue of whether the 1975 insubordination incident was properly before the arbitrator, but clearly the failure to prevail on this or any other issue, without more, does not amount to a breach of the union's duty. Murray also complains of the failure to introduce certain evidence of his medical condition on January 19 and evidence of the fact that it took another driver 7 1/2 hours to make the trip to Syracuse. The question of the tactics to be used is one for the union's attorney,

however, and deficiencies in the union's performance, even if they could be considered negligent, do not give rise to a breach of duty unless accompanied by discrimination, bad faith, or arbitrariness. Ernest v. Teamsters Local 789, 95 LRRM 3298 (N.D. W.Va. 1977); Bantley v. Lucky Stores, Inc., 95 LRRM 3232 (N.D. Cal. 1977). Moreover, the unrebutted affidavit of Mr. Rubenstein shows that he presented all the medical evidence given to him. Apparently the testimony about the time taken by the other driver was not presented, but it is difficult to see how this would have helped Murray since he had eight hours in which to make the trip.

The only other specific claim that the court has been able to find in the complaint or in the plaintiff's various other submissions is that the union failed to press the fact that his 1974 discharge was settled by arbitration. Again, this claim does no more than allege

negligence. It is clear that the union attempted to persuade the arbitrator not to consider the plaintiff's prior disciplinary record. The Union need not introduce cumulative evidence or arguments in order to fairly represent its members.

It is thus apparent that Murray's claims relate at most not to the union's failure to make a serious effort to present his case but rather to the manner of that presentation. Because a dispute over the tactics used does not give rise to a breach of the duty of fair representation, the defendants are entitled to summary judgment on the issues concerning the conduct of the 1976 arbitration hearing.

The second half of the defendants' argument is that even if the union in fact acted improperly in connection with the 1975 suspension, Murray nevertheless failed to exhaust available internal union remedies on the question of the union's failure to protest

the 1975 warning letter. It is somewhat difficult for the court to understand what exactly the plaintiff feels should have been done by the union in connection with the 1975 incident. In his complaint he suggests that the union breached its duty of fair representation by failing to pursue the 1975 suspension to arbitration, even though the union did obtain a voluntary settlement of the suspension which resulted in Murray's reinstatement with the loss of one week's back pay. It is doubtful that such a complaint gives rise to a breach of the duty of fair representation. Wide latitude is given to the union concerning the manner in which it processes grievances, provided that it does not act in an arbitrary or discriminatory fashion. Griffin v. UAW, 469 F2d 181 (4th Cir. 1972). Certainly the union's decision to accept the employer's offer to reinstate Murray with only a loss of one week's back pay cannot be considered to

be arbitrary. This offer was in fact accepted by Murray after some discussion with union officials. His reason for now questioning the union's conduct is that the voluntary settlement failed to result in the removal of the warning letter from his personnel file. The mere fact that the union failed to obtain all the relief desired by Murray cannot, however, be construed as a breach of the union's duty.

Even if the union did act improperly, however, Murray has plainly failed to exhaust readily available internal union remedies. Under Article XIX of the Union Constitution, a member may bring an action before the local executive board against a local union official who fails to perform his duty under the Union Constitution. The Board has the power to order the local official to perform an act and thus can order him to file a grievance on behalf of an employee such as Murray. See also Wigglesworth v. Teamsters

Local Union No. 592, 552 F2d 1027 (4th Cir. 1976), cert. denied, 431 U. S. 955 (1977). The internal union procedure is therefore adequate to reactivate the member's grievance. The Court has previously found that union officials are not so hostile to Murray as to preclude a fair hearing on his claim within the union. It further appears that had he pursued the internal union procedure Murray would have obtained a far quicker hearing on his claim that he did by waiting nearly three years from the time of the warning letter to file this suit. The requirements for exhaustion specified in Clayton v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, 101 S.Ct. 2088 (1981) are therefore met and the defendants are therefore entitled to summary judgment on this claim.

Murray also apparently argues that, independently of the settlement of his 1975 dismissal, the union was obligated to grieve

the warning letters. Such a contention runs afoul of the fact that the contract provides that the protest of a warning letter is the responsibility of the employee and not of the union. Article 46, §1 (a). Additionally, Murray has failed to exhaust internal remedies on this question as well.

Finally, Murray has complained that the union incorrectly told him that the warning letters would not be issued or would not count against him. He has not suggested, however, that he did or failed to do anything on the basis of these representations. Indeed, he states that he protested the warning letter of October 7 by a letter dated October 19, a date some time after the alleged misrepresentations were made. Thus, the misrepresentations did not have the effect or preventing Murray from exercising his right to protest the warning letter. Moreover, a breach of the duty of fair representation "occurs only when a union's dealings with the employer,

ostensibly on behalf of a member of the bargaining unit, show that the union's conduct toward the member has been arbitrary, discriminatory, or in bad faith." Smith v. Local No. 25, Sheet Metal Workers Int. Ass'n, 500 F2d 741 (5th Cir. 1974). In this instance there is no allegation of bad faith in dealings with the employer but rather an allegation of bad faith in dealings between Murray and the union. A breach of the duty of fair representation cannot arise in such a situation.

It is therefore the opinion of the court that Murray's claims do not constitute a breach of the duty of fair representation, and that additionally several of them may not be asserted in this case because of the failure to exhaust available internal union remedies. One additional theory has been vigorously pressed by counsel and will therefore also be addressed by the court. This is the question whether the entire action is barred by the

statute of limitations.

This court previously granted summary judgment in favor fo the defendants because the plaintiff had not exhausted available internal union remedies. At that time the only legal justification for failing to exhaust such remedies prior to filing suit in federal court was the possibility that union officials would be so hostile to the member as to make resort to internal procedures a waste of time. The decision of this court was affirmed by the Fourth Circuit Court of Appeals, but that decision was subsequently vacated and remanded by the Supreme Court in light of its decision in Clayton, supra. Murray vs. Branch, 622 F2d 585 (4th Cir., 1980), vacated and remanded, 101 S. Ct. 3044 (1981). The statute of limitations issue had also been raised by the defendants in this case, but the court has not previously addressed that issue. In the intervening period,

however, the Supreme Court also decided Mitchell v. United Parcel Service, Inc., 101 S. Ct. 1559 (1981), in which it held that an employee's §301 action against a union and the employer following an adverse decision of an arbitrator is to be governed by the state statute of limitations governing appeals from arbitration awards. The relevant Maryland law provides a thirty day statute of limitations. MD. CTS. & JUD.PRO. CODE ANN., §3-224 (a) (1) (1980 replacement volume). This action was not filed within thirty days of the decision of the arbitrator. The controlling issue is therefore whether the Mitchell decision should be applied retroactively so as to bar the present action.

The parties recognize that the controlling case on this issue is Chevron Oil Co. v. Huson, 404 U. S. 97 (1971). They differ, however, on the question of what result that case commands.

Judge Jones of this court recently held that Mitchell should be applied retroactively. DelCostello v. International Brotherhood of Teamsters, 524 F. Supp. 721 (D. Md. 1981). In that opinion, she found that Mitchell did not constitute the overruling of any clear past precedent, and thus the plaintiff in that case could not claim to have relied on the prior state of the law in deciding when to file suit. She noted that prior to Mitchell the law in the area was somewhat unclear, and that the risk that the ultimate decision would favor a shorter period for filing suit fell on the plaintiffs in section 301 actions. In the absence of any justifiable basis for reliance on the prior state of the law, she determined that the plaintiff before her could not meet the test established in Chevron Oil.

No argument has been presented to this court that is sufficient to require a different result in this case. The plaintiff has noted

that Mitchell only involved the question of what statute of limitations should govern a suit against an employer, and he argues that the Fourth Circuit ruled in Sine v. Local No. 992, International Brotherhood of Teamsters, 644 F2d 997 (4th Cir. 1981), rehearing denied, May 12, 1981, that the statute governing appeals from arbitration awards should not govern in a duty of fair representation suit against a union. This court has reviewed the opinions in Sine and is unable to find any such holding. It appears that the question of what period to apply in the suit against the union was not addressed by the court because the district court dismissed the suit against the union on a different ground.

The plaintiff further argues that to dismiss the present suit would be "inequity bordering on iniquity" because, had this court not previously granted summary judgment in favor of the defendants, the case

would have been heard before the decision in Mitchell. As defense counsel have pointed out, this argument assumes that this court would have decided the statute of limitations questions differently than the Supreme Court did. It is true that, in a decision rendered shortly before Mitchell, Judge Young of this court found tha three years was the appropriate period to apply in a case similar to the present one. Fox v. Mitchell Transport, Inc., 506 F. Supp. 1346 (D. Md. 1981). A reading of that opinion indicates, however, that there was no clear precedent on what Maryland statute of limitations to apply, and that several competing policy considerations were involved. It is also of some interest that that opinion was influenced by the decision of the Second Circuit in Mitchell v. United Parcel Service, 624 F2d 394 (2d Cir. 1980), the decision that was subsequently reversed by the Supreme Court. It is thus quite possible that this could* would have reached

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a different result, as did other district courts prior to Mitchell. See, e.g., DeLorto v. United Parcel Service, Inc., 401 F. Supp. 408 (D. Mass. 1975); Elrod v. Western Conference of Teamsters, 77 LRRM 2619 (C.D. Cal. 1971); Howerton v. J. Christenson Co., 76 LRRM 2937 (N.D. Cal. 1971).

For all the reasons stated in this opinion, it is the opinion of this court that the defendants are entitled to summary judgment in their favor.

s/ Herbert L. Murray

Dated: January 25th, 1982

JOHN MURRAY, Appellant

v.

BRANCH MOTOR EXPRESS COMPANY and LOCAL 557, INTERNATIONAL BROTHERHOOD of TEAMSTERS, Appellees.

No. 82-1202.

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT.

Submitted October 3, 1983.

Decided December 20, 1983.

In Union member's action against employer for alleged breach of collective bargaining agreement and against union for alleged breach of duty of fair representation by mishandling grievance matter, the United States District Court for the District of Maryland, at Baltimore, Herbert F. Murray, J., granted summary judgment for employer and union. Union member appealed.

1045, 91 L.Ed. 1320 (1947).

The Court of Appeals, Butzner, Senior Circuit Judge, held that claims were barred by six-month statute of limitations under the National Labor Relations Act, applicability of which followed from retroactive application of recent Supreme Court's decision.

Affirmed.

Courts (Key)100 (1)

Union member's action against employer for alleged breach of collective bargaining agreement and against union for alleged breach of duty of fair representation by mishandling grievance matter was barred by six-month statute of limitations recently held applicable under the National Labor Relations Act to such actions brought by an employee; equities of case, including fact that employee waited almost 29 months to file suit, did not change the court's conclusion to retroactively apply Supreme Court's decision holding six-month statute was applicable. Labor Management

Relations Act, 1947, § 301, 29 U. S. C. A. § 185; National Labor Relations Act § 10 (b), as amended, 29 U. S. C. A. § 160(b).

Harry Goldman, Jr., Richard P. Neuworth, Baltimore, Maryland, for appellant.

James A. Matthews, Jr., Francis M. Milone, James F. Anderson, Morgan, Lewis and Bockius, Philadelphia, Pa., Frank W. Stegman, Gebhardt and Smith, Baltimore, Maryland for Branch Motor Exp. Co.

Bernard W. Rubenstein, Carl S. Yaller, Edelman and Rubenstein, P. A., Baltimore, Maryland for Local 557, International Brotherhood of Teamsters.

Before WINTER, Chief Judge, CHAPMAN, Circuit Judge and Butzner, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

After John Murray was discharged by Branch Motor Express Company, his union filed a grievance on his behalf. When the

parties failed to resolve the dispute, the matter was submitted to arbitration. The arbitrator concluded that Murray's discharge was proper in an award dated April 22, 1976.

On September 13, 1978, Murray filed an action under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, charging Branch with breach of the collective bargaining agreement and the union with breach of its duty of fair representation by mishandling the matter. The district court granted summary judgment for Branch and the union because, in addition to the claim's lack of merit, the action was barred by Maryland's 30-day statute of limitations for vacation of arbitration awards which was made applicable by United Parcel Service, Inc. v. Mitchell, 451 U. S. 56, 101 S. Ct. 1559, 67 L.Ed.2d 732 (1981). While Murray's appeal was pending, the Supreme Court held that the six-month statute of limitations contained in §10(b) of the National Labor

Relations Act 29 USC § 160, applies to actions brought by an employee for breach of contract and breach of fair representation. DelCostello v. International Brotherhood of Teamsters, ____U.S.____, 103 S. Ct. 2281, 76 L.Ed. 2d 476 (1983).

Generally, "an appellate court must apply the law in effect at the time it renders its decision." Thorpe v. Housing Authority of The City of Durham, 393 U. S. 268, 281, 89 S. Ct. 518, 525, 21 L. Ed.2d 474 (1969). See United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed.2d 474 (1801). Murray contends, however, that DelCostello should not be applied retroactively, relying on Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971).

We are persuaded by Perez v. Dana Corp., 718 F2d 581 (3d Cir., 1983), that DelCostello should be applied retroactively.* In that

case, the court found that, applying the Chevron test, the six-month statute of limitations was not an abrupt and fundamental shift in a doctrine on which the plaintiff relied because the prior law was erratic and inconsistent. The court also found that the purpose of the DelCostello rule and the equities of the plaintiff's case required retroactive application of the decision. We can only add that the equities of the instant case, including the fact that Murray waited almost 29 months to file suit, do not change our conclusion. Murray's claims against Branch and the union are barred by the six-month statute of limitations, and the judgment of the district court dismissing the action is affirmed.